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Supreme Court, U.S.
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No. 96-1740

In the Supreme Court of the United States

OCTOBER TERM, 1996

GESKE AND SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by bringing a baseless lawsuit against the unions to retaliate against their lawful picketing.

2. Whether the National Labor Relations Board properly exercised its remedial power by ordering petitioner to reimburse the unions for the attorneys' fees incurred in defending against the retaliatory lawsuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 103 F.3d 1366. The decision and order of the National Labor Relations Board (Pet. App. 24a-31a), and the decision of the administrative law judge (Pet. App. 32a-120a), are reported at 317 N.L.R.B. 28.

JURISDICTION

The court of appeals (Pet. App. 162a) entered its judgment on January 9, 1997. On March 20, 1997, Justice Stevens extended the time within which to

file a petition for a writ of certiorari to April 30, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in asphalt paving and the manufacture of asphalt mix. Pet. App. 35a. On August 19, 1991, Operating Engineers Local 150, assisted by Teamsters Local 301 (the Unions), began picketing petitioner's facility, seeking recognition as the representative of petitioner's employees. *Id.* at 2a, 42a, 43a. Six to twelve pickets patrolled along a public roadway running in front of the plant, carrying picket signs that read: "I.U.O.E. LOCAL 150 ON STRIKE AGAINST GESKE FOR RECOGNITION AS MAJORITY BARGAINING REPRESENTATIVE OF COMPANY'S OPERATING ENGINEERS." *Id.* at 42a-43a.

2. In September 1991, petitioner filed suit in state court against the Unions, alleging trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage. Pet. App. 3a, 63a-64a. The complaint requested injunctive relief and damages "incidental to [the] injunctive relief." *Id.* at 117a; see also *id.* at 4a. Following a nine-day hearing, during which petitioner introduced the testimony of approximately 17 witnesses, the state court granted the Unions' motion for a directed finding in their favor and denied petitioner's request for a preliminary injunction. *Id.* at 4a, 80a, 131a. The court explained that the Unions' picket signs did not "by any reasonable interpretation indicate a trade libel against Geske, and I believe that the likelihood of success on the merits as to that count is small." *Id.* at 138a. The court also found that

petitioner had no likelihood of success on its claims of tortious interference with contractual relationships and prospective advantage, because any interference in petitioner's business was a lawful "part of" the picketing and flowed from "the very nature of having the picketers." *Id.* at 140a-141a. Petitioner presented "no evidence" that the Unions "committed any unlawful trespasses" or made "threats of violence." *Id.* at 141a.[1]

The Appellate Court of Illinois affirmed the trial court's denial of injunctive relief. Pet. App. 93a, 121a-130a. The Illinois Supreme Court denied petitioner leave to file an appeal. *Id.* at 5a. This Court denied petitioner's petition for a writ of certiorari. *Id.* at 5a & n.4, 96a.

3. While petitioner's case was pending before the Appellate Court of Illinois, the Regional Director of the National Labor Relations Board (Board) issued an administrative complaint against petitioner. Pet. App. 87a-88a. The complaint alleged that petitioner had prosecuted a state-court lawsuit that lacked a reasonable basis and was motivated by an intent to retaliate against the Unions for engaging in protected concerted activity, in violation of Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). Pet. App. 87a.

The administrative law judge (ALJ) sustained the Regional Director's complaint. Pet. App. 32a-120a. The ALJ found that Local 150 was engaged in peaceful recognitional picketing protected by the Act. *Id.* at 102a-107a, 116a. Applying *Bill Johnson's Restau-*

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[1] Petitioner subsequently filed a third and fourth amended complaint, in which it added various new defendants and allegations to the suit. Pet. App. 82a, 96a, 131a, 146a.

rants, Inc. v. *NLRB*, 461 U.S. 731 (1983), the ALJ concluded that petitioner violated Section 8(a)(1) by filing and prosecuting its state-court suit against the Unions. Pet. App. 116a. First, relying "mostly on the determination of the state judge who conducted the state court trial that [petitioner] had failed to establish likelihood of success on the merits, and on the action of the state appellate and supreme courts in denying [petitioner's] interlocutory appeal," the ALJ concluded that the lawsuit was without basis. *Id.* at 110a. Although petitioner asserted that it had "lots of other evidence" beyond what it presented to the state courts in support of its preliminary injunction motion, the ALJ observed that petitioner had "fail[ed] to enlighten me as to the nature of this 'lots of other evidence.'" *Id.* at 34a n.4.[2]

Second, the ALJ found, based on the evidence presented to her, that petitioner had filed and prosecuted the state-court lawsuit "to retaliate against the protected concerted activity of [the Unions]." Pet. App. 115a.

Based on the violation of Section 8(a)(1), the ALJ recommended that the Board order petitioner, among other things, to withdraw its state-court lawsuit "to the extent that this lawsuit includes allegations in the third amended complaint or its predecessors" and to reimburse the Unions for all legal expenses "incurred in connection with such allegations." Pet. App. 118a.

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[2] The ALJ further found petitioner's argument that the ruling on the preliminary injunction motion did not substantially dispose of its case to be inconsistent with representations petitioner previously made to this Court and to the Illinois Supreme Court. Pet. App. 111a.

With certain modifications not relevant here, the Board affirmed the ALJ's findings and conclusions and adopted the recommended order. Pet. App. 24a-31a.[3]

4. The court of appeals enforced the Board's order. Pet. App. 1a-23a. The court agreed with the Board that, "under the Illinois standard for trade libel, [petitioner's] state lawsuit against Local 150 and the other defendants was clearly baseless." *Id.* at 23a.[4] The court rejected petitioner's contention that inclusion of the phrase "On Strike" rendered the picket signs false, agreeing with the state courts that "there is no reasonable way to interpret the statements as [petitioner] suggests." *Id.* at 13a. Furthermore, even if the picket signs contained a false statement, the court of appeals agreed with the state courts and the Board that, under Illinois law, petitioner was not defamed: "There is nothing about a company's employees being on strike that suggests that the

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[3] Despite the ALJ's decision, petitioner continued to prosecute its state-court suit. The Board's Regional Director filed a petition in federal district court, seeking an injunction barring petitioner from prosecuting its lawsuit until the Board issued a final decision in the unfair labor practice proceeding. Pet. App. 157a; see 29 U.S.C. 160(j). Petitioner filed a number of counterclaims. Pet. App. 157a-158a. When the Board issued its decision affirming the ALJ, the Regional Director voluntarily dismissed his petition. The district court then dismissed petitioner's counterclaims for lack of jurisdiction. *Id.* at 158a, 163a-165a. The court of appeals affirmed. *Zipp* v. *Geske & Sons, Inc.*, 103 F.3d 1379 (7th Cir. 1997) (Pet. App. 154a-162a). Petitioner has not sought further review of that decision.

[4] The court noted that only the viability of the state libel claim was at issue in the case, because petitioner had not included its tortious interference claims in its statement of issues presented for appellate review. Pet. App. 11a.

company has engaged in fraud or mismanagement or that necessarily assails the company's financial position or business methods." *Id.* at 14a (citing *Vee See Constr. Co.* v. *Jensen & Halstead, Ltd.*, 399 N.E.2d 278 (Ill. App. Ct. 1979)). The court also ruled that substantial evidence supported the Board's finding that petitioner filed the lawsuit for retaliatory reasons. Pet. App. 15a, 23a. Petitioner's claim to the contrary was deemed "completely devoid of merit." *Id.* at 15a.

Lastly, the court of appeals held that the Board acted within its broad remedial authority in ordering petitioner to reimburse the Unions for the attorneys' fees they incurred in defending against petitioner's lawsuit. Pet. App 20a-23a. The court noted that "the Board may award attorneys' fees to unions when they are subjected to patently frivolous litigation before the Board in the course of an unfair labor practice proceeding," and that "[t]hat situation is highly analogous to the situation before us today." *Id.* at 22a. The award of fees, moreover, "effectuates the policies underlying the [Act]," because "[t]he injured party, the [u]nion that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that the court of appeals erred in applying the standard established in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), for determining when an employer's state court action violates Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). In *Bill Johnson's*, this Court held that "it

is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against" an exercise of rights protected by the Act. 461 U.S. at 744. A lawsuit is baseless if the employer cannot "present the Board with evidence that shows his lawsuit raises genuine issues of material fact" or "genuine state-law legal questions." *Id.* at 745-746. If a lawsuit is determined to be baseless, the Board may then decide whether the suit was filed with the subjective intention of retaliating against the exercise of protected rights. *Id.* at 747.

a. Petitioner does not challenge the Board's finding that the Unions in this case were engaged in peaceful recognitional picketing protected by the Act. Nor does petitioner seek review of the Board's factual finding that petitioner filed and prosecuted its state-court lawsuit in order to retaliate against the Unions for engaging in such protected activity. Rather, petitioner contends (Pet. 11) that the court of appeals erred in holding that its lawsuit was baseless because the suit was not "based on intentional falsehoods or on knowingly false claims." This claim does not merit further review.

This Court recognized in *Bill Johnson's* that, in addition to suits based on "intentional falsehoods" and "knowingly frivolous claims," (461 U.S. at 743) lawsuits that "lack[] a reasonable basis in fact or law" can provide the predicate for a Section 8(a)(1) violation. *Id.* at 748. The court of appeals correctly found that petitioner's trade libel claim lacked such a reasonable basis. Both the state trial and appellate courts held that petitioner was unlikely to succeed on its trade libel claim. Pet. App. 125a-127a, 138a. Nor did petitioner's trade libel claim present a genuine issue of material fact, because the content of the

picket signs was not in dispute. Furthermore, each state court that reviewed the claim concluded that there was no reasonable way to construe the signs as constituting a trade libel. *Id.* at 127a, 138a. Accordingly, the court of appeals correctly concluded that petitioner's trade libel claim was baseless under the standard set forth in *Bill Johnson's*.

b. Contrary to petitioner's assertion (Pet. 12), the court of appeals' decision is consistent with *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). *Columbia* held that, under the antitrust laws, litigation is a "sham" if the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 508 U.S. at 60. In the present case, every court that has considered the question—both state and federal—has concluded (as did the NLRB) that petitioner's trade libel claim had no realistic chance of success on the merits. Those consistent determinations are the equivalent of a finding that the case is "objectively baseless." This is especially true in light of petitioner's inability or unwillingness to identify any new or additional evidence to buttress its claim, beyond what it presented to the state courts at the preliminary injunction stage five years ago.

Likewise, petitioner's contention (Pet. 12-13) that the court of appeals' decision conflicts with decisions of the Third, Fifth, and Ninth Circuits is without merit. Petitioner notes that those courts applied a "no realistic chance of success on the merits" standard. *Ibid.* That is merely another way of articulating the standard applied by the Board and the court of appeals here. See Pet. App. 12a-14a, 109a-113a (applying *Bill Johnson's* standard and relying, *inter alia*,

upon state courts' finding that petitioner is unlikely to succeed on the merits).

c. Petitioner also argues (Pet. 14) that the Board contravened *Bill Johnson's* by "review[ing] all the evidence" and "ma[king] numerous credibility and demeanor based decisions in favor of one party over another." The Board's determination that petitioner's suit was baseless, however, rested upon the legal conclusions of the state courts and petitioner's own statements in its filings with the Illinois Supreme Court and this Court. Pet. App. 110a-113a. The credibility determinations that were made (as relevant here) pertained to the Board's factual finding that petitioner acted with a retaliatory motive, which is fully within the Board's province to adjudicate. See, *e.g.*, *id.* at 44a, 52a n.18, 61a n.21, 62a n.23, 66a n.28.[5]

Nor is there merit to petitioner's related contention (Pet. 13) that the court of appeals erred in faulting petitioner for its refusal to proffer the additional evidence it claimed to possess. *Bill Johnson's* squarely places on the state-court plaintiff the burden "to come forward with any evidence * * * or at least with an acceptable explanation why he cannot present such evidence" demonstrating that its state-law claim has a reasonable basis or that genuine issues of material fact remain. 461 U.S. at 746 n.12; see also *id.* at 745-746.[6]

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[5] Petitioner has not sought review of the aspect of the court of appeals' decision pertaining to the retaliatory motive prong of the *Bill Johnson's* test.

[6] Petitioner criticizes (Pet. 17) the court of appeals for not considering the libel per quod claim asserted in its fourth amended complaint. Petitioner, however, did not argue that theory below, and neither the Board nor the court of appeals

In any event, petitioner's narrow challenge to how the Board and court of appeals applied the correct legal standard in this particular case presents no issue of broad or recurring importance meriting this Court's review.

2. Petitioner contends (Pet. 19-25) that the Board's order requiring petitioner to reimburse the Unions for the legal expenses they incurred in defense of the state-court litigation conflicts with decisions of this Court and of the Sixth Circuit. No conflict exists meriting this Court's review.

The award of fees is fully consistent with this Court's precedents. *Bill Johnson's* provided that, when an employer violates Section 8(a)(1) of the Act by filing a baseless lawsuit for a retaliatory motive, "the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747.

Petitioner contends (Pet. 19-22) that *Bill Johnson's* allows reimbursement only of "employees," and not the nonemployee union organizers named as defendants in petitioner's state suit. The reference to employee awards in *Bill Johnson's*, however, simply reflected the facts of the case before the Court. Petitioner cites nothing in the opinion's language or reasoning that mandates "a categorical inference by negative implication" (Pet. App. 21a) that the Board is precluded from awarding costs to a union under any

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has addressed the claim. Pet. App. 13a n.12; see also *id.* at 116a, 118a (remedial action required by Board's order confined to allegations "in the third amended complaint or its predecessors"). "It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

circumstances. Indeed, because the employees' "right of self-organization depends in some measure on [their] ability * * * to learn the advantages of self-organization from others," *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 532 (1992) (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)), unions possess derivative rights to engage in organizational activities to protect the employees' underlying right to organize, *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). While the union's derivative rights are not as broad as the employees' rights, they support a limited award of fees that simply reimburses the union for the costs it incurred in defending against a baseless lawsuit that was intended to interfere with the employees' right to organize. Cf. *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964) (Board enjoys "a broad discretionary" power to devise remedies "subject to limited judicial review," so that a remedial order of the Board will be reversed only if it "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act") (citations and internal punctuation omitted). See also *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324-325 (1994), and cases there cited.

Contrary to petitioner's assertion (Pet. 20), the court of appeals' decision accords with those of other circuits. See *Gibson Greetings, Inc.* v. *NLRB*, 53 F.3d 385, 394 (D.C. Cir. 1995) ("The NLRB can award a Union the costs and fees it incurs in defending against an employer's baseless, retaliatory lawsuit only if it determines that the filing or maintenance of the lawsuit was an unfair labor practice."); *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 71 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995). Petitioner is

correct that the Sixth Circuit declined to enforce a particular attorneys' fee award to a union in *Johnson & Hardin Co.* v. *NLRB*, 49 F.3d 237, 244 (1995). But in that case, the Sixth Circuit had reversed the Board's determination that the employer's state-court lawsuit against the union was baseless and retaliatory. *Id.* at 243-244. The predicate for an award of fees—compensation for the costs incurred by the union in an unlawful lawsuit—was thus absent in *Johnson*, and the Board failed to offer any alternative support for its award. [7] Accordingly, there is no direct conflict between the decision reached in *Johnson* and that in the present case, and any alleged inconsistency in the reasoning of the two opinions does not merit this Court's review.[8]

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[7] The court's statement that the Board erred in finding "no basis for distinguishing between employees and nonemployee union representatives as recipients of reimbursement" was thus dictum. *Johnson*, 49 F.3d at 244.

[8] Petitioner errs in asserting (Pet. 20, 23) that the award of fees is inconsistent with the Board's policy of awarding costs and fees in cases where a party asserts "patently frivolous" defenses in a Board proceeding. See *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972), enforced as modified, 502 F.2d 349 (D.C. Cir.), cert. denied, 417 U.S. 921 (1974); *Heck's, Inc.*, 215 N.L.R.B. 765 (1974) (supplemental decision on remand). Attorneys' fees and costs are awarded in the latter situation to ensure "speedy access to uncrowded Board and court dockets" by "discourag[ing] future frivolous litigation." *Tiidee*, 194 N.L.R.B. at 1236. The fees in this case were awarded to compensate a party that had been forced to defend against a baseless and retaliatory court suit. Because the remedies serve distinct purposes, the Board could reasonably set different standards for the award of attorneys' fees and costs in each situation. Petitioner's reliance (Pet. 24) on *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988), remanded, 904 F.2d 1156 (7th Cir. 1990), modified, 307 N.L.R.B. 764 (1992), is also misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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There, the Board upheld an ALJ recommendation not to award a nonemployee union organizer legal expenses where the employer's actions enjoyed "some debatable support." *Id.* at 194-195. Further, the cases relied upon by the ALJ in that case for the proposition that the Board can award legal expenses only to employees were subsequently overruled by the Board. See *Johnson & Hardin Co.*, 305 N.L.R.B. 690, 693 (1991), enforced in part & order vacated in part, 49 F.3d 237 (6th Cir. 1995).